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NO. 85-706 (2)

in the Supreme Court of the United States

OCTOBER TERM, 1985

LOMBARD'S, INC., a Florida corporation,
Petitioner,

vs.

PRINCE MANUFACTURING, INC.,
a foreign corporation,
Respondent.

On Petition for a Writ of Certiorari to Review a Judgment of the United States Court of Appeals for the Eleventh Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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681

QUESTIONS PRESENTED FOR REVIEW

I

DOES THE DECISION OF THE COURT OF APPEALS AFFIRMING THE DISTRICT COURT'S DISMISSAL UNDER RULE 12(B)(6) OF LOMBARD'S ANTITRUST COMPLAINT FOR FAILURE TO ALLEGE ANY FACTS DEMONSTRATING A CONSPIRACY, INCLUDING THE IDENTIFICATION OF ANY ALLEGED CO-CONSPIRATOR, AND THE DISTRICT COURT'S REFUSAL TO PERMIT ONE DEPOSITION PRIOR TO THE DISMISSAL CONFLICT WITH THIS COURT'S DECISION IN *HOSPITAL BUILDING COMPANY V. TRUSTEES OF REX HOSPITAL*, 435 U.S. 738, 96 S.CT. 1848, 48 L.ED. 2D 338 (1976) OR WITH THE DECISION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT IN *LITTLEJOHN V. SHELL OIL COMPANY*, 456 F.2D 225 (5TH CIR. 1972) OR WITH THE DECISION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT IN *INVESTMENT PROPERTIES INTERNATIONAL, INC. V. IOS, LTD.*, 459 F.2D 705 (2D CIR. 1972)?[1]

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[1]Respondent has revised the first question presented for this Court's review to accurately reflect the bases for the decision of the Court of Appeals. As noted by Petitioner, the Court of Appeals faulted the Amended Complaint for its failure to identify any participant in the alleged conspiracy other than the Respondent. However, the court below was also concerned with the wholly conclusory nature of Petitioner's allegations and other factors. *Lombard's Inc. v. Prince Manufacturing, Inc.*, 753 F.2d 974, 975 (11th Cir. 1985).

II

DOES THE DECISION OF THE COURT OF APPEALS AFFIRMING THE DISTRICT COURT'S DISCOVERY ORDER BY APPLYING THE "ABUSE OF DISCRETION" STANDARD CONFLICT WITH THE DECISION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT IN *SALTER V. UPJOHN COMPANY*, 593 F.2D 649 (5TH CIR. 1979)?[2]

[2]Respondent has revised the second question presented for this Court's review in accordance with the argument actually made by Petitioner.

TABLE OF CONTENTS

Pages

Questions Presented for Review i

Table of Authorities v

Statement of Jurisdiction 2

Statement of the Case 3

Reasons for Denying the Writ 11

I.

THE DECISION OF THE COURT OF APPEALS AFFIRMING THE DISTRICT COURT'S DISMISSAL UNDER RULE 12(B)(6) OF LOMBARD'S ANTITRUST COMPLAINT FOR FAILURE TO ALLEGE ANY FACTS DEMONSTRATING A CONSPIRACY, INCLUDING THE IDENTIFICATION OF ANY ALLEGED CO-CONSPIRATOR, AND THE DISTRICT COURT'S REFUSAL TO PERMIT ONE DEPOSITION PRIOR TO THE DISMISSAL DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *HOSPITAL BUILDING COMPANY V. TRUSTEES OF REX HOSPITAL*, 435 U.S. 738, 96 S.CT. 1848, 48 L.ED. 2D 338 (1976) OR WITH THE DECISION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT IN *LITTLEJOHN V. SHELL OIL COMPANY*, 456 F.2D 225 (5TH CIR. 1972)

TABLE OF CONTENTS (Continued)

Page

OR WITH THE DECISION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT IN *INVESTMENT PROPERTIES INTERNATIONAL, INC. V. IOS, LTD.*, 459 F.2D 705 (2D CIR. 1972) 11

II.

THE DECISION OF THE COURT OF APPEALS AFFIRMING THE DISTRICT COURT'S DISCOVERY ORDER BY APPLYING THE "ABUSE OF DISCRETION" STANDARD DOES NOT CONFLICT WITH THE DECISION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT IN *SALTER V. UPJOHN COMPANY*, 593 F.2D 649 (5TH CIR. 1979) 22

Conclusion 26

Certificate of Service 27

TABLE OF AUTHORITIES

Cases	Pages
Bonner v. City of Pritchard, 661 F.2d 1206 (11th Cir. 1981) (en banc)	18, 22
City of Gainesville v. Florida Power & Light Company, 488 F.Supp. 1258 (S.D. Fla. 1980)	8, 12
Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)	14
Hospital Building Company v. Trustees of Rex Hospital, 425 U.S. 738, 96 S.Ct. 1848, L.Ed.2d 338 (1976)	11, 13
Hospital Building Company v. Trustees of Rex Hospital, 511 F.2d 687, 678, 684 (4th Cir. 1979)	13
Investment Properties International, Inc. v. IOS, Ltd., 459 F.2d 705 (2d Cir. 1972)	11, 18, 21, 22
Larry R. George Sales Company v. Cool Attic Corp., 587 F.2d 266, 273-74 (5th Cir. 1979)	12

TABLE OF AUTHORITIES (Continued)

Cases	Pages
Littlejohn v. Shell Oil Company, 456 F.2d 225 (5th Cir. 1972), vacated on other grounds, 483 F.2d 1140 (5th Cir., en banc, 1973), cert. denied, 414 U.S. 1116, 94 S.Ct. 849 (1973)	11, 18, 20
Littlejohn v. Shell Oil Company, 326 F.Supp. 45 (N.D. Tex. 1971)	19, 20
Lombard's Inc. v. Prince Manufacturing, Inc. 753 F.2d 974 (11th Cir.). reh., denied, ____ F.2d ____ (1985)	2, 5, 12
Lombard's Inc., v. Prince Manufacturing, Inc. 538 F.Supp. 1572 (S.D. Fla. 1984)	2
Monsanto Company v. Spray-Rite Service Corporation, ____U.S.____, 104 S.Ct. 1464, 79 L.ED.2d 775 reh. denied, ____U.S.____, 104 S.Ct. 2378, ____ L.ED. 2d____ (1984)	16, 17
Moore v. Mead's Fine Bread Company, 348 U.S. 115, 75 St.Ct. 148, 99 L.ED. 145 (1954)	19
Quality Foods v. Latin American Agribusiness Development Corp., 711 F.2d 989 (11th Cir. 1983)	12

TABLE OF AUTHORITIES (Continued)

Cases	Pages
Quinonoz v. National Assoc. of Securities Dealers, Inc., 540 F.2d. 824, 826-28 (5th Cir. 1976)	12
Salter v. Upjohn Company, 593 F.2d 649 (5th Cir. 1979)	22, 23, 24, 25
United States v. Union Central Life Insurance Co., 368 U.S. 291, 82 S.Ct. 349, 7 L.Ed.2d 294 (1961)	18
Statutes and Rules	
Sherman Antitrust Act, s. 1, 26 Stat. 209, as amended, 15 U.S.C. s. 1 (1976)	3
Rule 27(b), Federal Rules of Civil Procedure	4
Rule 60(b)(2), Federal Rules of Civil Procedure	5
Rule 17.1, Rules of the Supreme Court of the Supreme Court of the United States	18

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On Petition for a Writ of Certiorari to Review a Judgment of the United States Court of Appeals for the Eleventh Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondent, PRINCE MANUFACTURING, INC., respectfully prays that this Court deny a Writ of Certiorari

to review the Judgment of the United States Court of Appeals for the Eleventh Circuit entered in this case on February, 21, 1985.

STATEMENT OF JURISDICTION

The parties are in agreement that LOMBARD'S has timely filed its petition for a Writ of Certiorari from a final decision of the United States Court of Appeals for the Eleventh Circuit. *Lombard's Inc. v. Prince Manufacturing, Inc.*, 753 F.2d 974 (11th Cir.), reh. denied, ____ F.2D ____ (11th Cir. 1985).

STATEMENT OF THE CASE

I.

COURSE OF PROCEEDINGS AND DISPOSITION IN THE DISTRICT COURT AND COURT OF APPEALS

On February 21, 1984, LOMBARD'S filed its original Complaint alleging violations of Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§. 1 and 2. (App. A) Named as Defendants were PRINCE MANUFACTURING, INC. ("PRINCE") and its corporate parent, CHESEBROUGH-POND'S, INC. Together they were accused of participating in an unlawful conspiracy to restrain trade and of monopolization. Defendants filed a Motion to Dismiss and a Motion for Stay of Discovery. In an Order of Dismissal dated May 3, 1984, the District Court explained in five pages of opinion why the Plaintiff had failed to state a claim under either Section 1 or Section 2 of the Sherman Act. (App. B). On May 8, Plaintiff moved to vacate the District Court's Dismissal and for leave to file a proposed Amended Complaint attached to the Motion. The District Court treated this Motion simply as one for leave to file an Amended Complaint, granted the leave, and ordered the Defendants to respond within twenty (20) days. Since Plaintiff had dropped CHESEBROUGH-POND'S, INC. as a party to the Amended Complaint (App. C), only PRINCE remained to respond, which it did by filing a Motion to Dismiss.

Just one day before Defendant PRINCE filed its Motion to Dismiss the Amended Complaint, Plaintiff served a notice of taking the deposition of a non-party witness, ANA L. APRIL, for July 9. On July 6, PRINCE

moved for protection, which the District Court granted (App. D). In doing so, the District Court exercised its discretion to first review the pending Motion to Dismiss the Amended Complaint to see whether its allegations stated a claim and justified the taking of this discovery.

On July 18, the District Court entered an Order granting PRINCE's Motion to Dismiss the Amended Complaint. (App. E) The District Court explained why the allegations of the Amended Complaint did not allege unlawful conduct and were wholly inadequate to state a claim for conspiracy under the Sherman Act. LOMBARD'S moved for reconsideration, but on the next day filed a Notice of Appeal from the Order granting the Motion to Dismiss the Amended Complaint. On August 10, 1984, LOMBARD'S filed a motion for Leave to Take Depositions pending appeal in the District Court under Rule 27(b), Federal Rules of Civil Procedure. The District Court denied Plaintiff's Motion on August 14. A second Notice of Appeal was filed by LOMBARD'S on August 17, seeking review of the District Court's discovery Order.

Meanwhile, on July 27, shortly after dismissal of the Amended Complaint, and while the Eleventh Circuit had jurisdiction of the case, Plaintiff LOMBARD'S had filed yet another antitrust action in the Southern District. This third effort was based on allegations practically identical to those contained in the allegations dismissed by Judge King, yet fell before Judge Atkins. The case was assigned to Judge Atkins because LOMBARD'S counsel had represented in the Civil Action Designation Form that there was no pending related case and that a substantially similar case had not previously been filed in the Southern District. PRINCE's counsel

responded with a notice to Judge King and by filing a Motion to Dismiss and a Motion to Transfer with Judge Atkins. Judge Atkins eventually dismissed this attempt at judge shopping, and again LOMBARD'S appealed. This third appeal was consolidated with the prior appeals. Thereafter, LOMBARD'S moved for and obtained the dismissal of the third appeal.

The United States Court of Appeals for the Eleventh Circuit affirmed the District Court's Judgment of Dismissal and its Order denying LOMBARD'S Rule 27(b) Motion on February 21, 1985. *Lombard's Inc. v. Prince Manufacturing, Inc.*, 753 F.2d 974 (11th Cir. 1985).

On March 6, 1985, LOMBARD'S filed a Petition for Rehearing and Suggestion for Rehearing En Banc. On May 30, 1985, the Court of Appeal denied the Petition for Rehearing. ____ F.2d ____ (11th Cir. May 30, 1985).

As noted in footnote 1 of LOMBARD'S Petition for Writ of Certiorari, LOMBARD'S filed a Motion For Relief From Judgment Of Dismissal under Rule 60(B), Federal Rules of Civil Procedure, on March 7, 1985. The District Court denied this motion on May 17, 1985. LOMBARD'S appeal of that Order is presently pending in the Court of Appeals.

II.

STATEMENT OF THE FACTS

A. Original Complaint

Attached to LOMBARD'S original Complaint (as well as its Amended Complaint) and incorporated therein was the reason for this suit: A proposed standard Distribution Agreement offered unilaterally by PRINCE to LOMBARD'S and to all other distributors of new tennis racquet models introduced in January, 1984. (Hereinafter the "Retail Agreement", App. A) By the terms of this proposed Retail Agreement, PRINCE indicated its willingness to distribute the PRINCE Precision Graphite and the PRINCE J/R Pro racquet models only through those companies which would recognize and abide by various principles considered by the manufacturer to be essential to quality customer service and the marketing success of the *new* products. For example, PRINCE proposed that the new racquets be sold only by "qualified personnel available to advise customers as to the concept underlying the PRINCE "full-size" racquet, including special advantages of its unique construction, and as to the proper selection of racquets, grip size, strings and tension. In order to further assure quality service and thereby enhance the good will of tennis players toward PRINCE and its products, the subject Retail Agreement also requires the would-be retailer to be staffed with personnel trained to provide advice in person on the PRINCE concept and to make demonstration models available for customers' trial use. Among its other customer oriented provisions, the Agreement also insists that retailers of the new models encourage complaining customers to

bring racquets to the retailer for minor service or for assistance in returning racquets to the manufacturer for warranty handling.

LOMBARD'S had hoped to mass-market the new PRINCE racquet models through wholesale operations and through mail-order catalogs. Of course, by the use of such mass-marketing methods, LOMBARD'S would be unable to provide the personalized, over-the-counter service by qualified personnel required by the terms of the proposed Retail Agreement. LOMBARD'S objected to the abovementioned terms and refused to sign the Retail Agreement. Since LOMBARD'S would not agree to refrain from marketing methods inconsistent with the Retail Agreement PRINCE, in response, refused to sell the new racquet models to LOMBARD'S.

The original Complaint conceded that "PRINCE and [CHESEBROUGH-POND'S] have refused to fill purchase orders for the two (2) new tennis racquets submitted by LOMBARD'S solely because LOMBARD'S has refused to sign the proposed written agreement." (App. A-1). Based upon this allegation, LOMBARD'S claimed that PRINCE had violated Sections 1 and 2 of the Sherman Act. Then, without any underlying factual allegations the Complaint conclusorily alleged:

> As further set forth in the succeeding portions of this Complaint, PRINCE and C-P, together and with others at this time unknown to LOMBARD'S have engaged, and are now engaged, in an unlawful combination and conspiracy to restrain interstate trade and commerce and have unlawfully attempted to

> restrain interstate trade and commerce in violation of Section 1 . . . of the Sherman Act. (App. A-2).

Thereafter, LOMBARD'S admitted that its claim of monopolization under Section 2 was "inadvertent." (See App. B-3). In dismissing the Complaint the District Court had little difficulty recognizing that such "conclusory" allegations failed to meet minimum standards for pleading an antitrust conspiracy. The District Court further admonished Plaintiff to consider the several other problems raised by Defendants' Motion to Dismiss should it decide to amend.

In light of the frivolity of Plaintiff's antitrust claims, Defendants had moved to stay discovery under the authority of *City of Gainesville v. Florida Power & Light Company*, 488 F.Supp. 1258 (S.D. Fla. 1980). It was Defendants' position that it was within the District Court's discretion to grant a temporary stay of discovery at a time when Plaintiff had come forward with nothing more than conclusory allegations. Moreover, Defendants pointed out that Plaintiff's 123 interrogatories were grossly in violation of Rule 10(I)(5), Local Rules of the Southern District. The District Court's dismissal of the original Complaint effectively excused Defendants from responding to this discovery. (See App. D).

B. Amended Complaint

The conspiracy allegations of LOMBARD's Amended Complaint were as conclusory as the original Complaint, but even less specific. For example, CHESEBROUGH-POND'S, INC., the only entity previously named as a

co-conspirator with Defendant PRINCE, was dropped as a party and was nowhere mentioned in the Amended Complaint. In place of CHESEBROUGH-POND'S, INC., the Amended Complaint named no person, firm or corporation as an alleged co-conspirator. The Amended Complaint merely continued the original Complaint's reliance upon the hollow allegation that "others at this time unknown" participated in the supposed combination and conspiracy.

The operative allegations of the Amended Complaint were:

> 10. Upon information and belief, PRINCE, together and with PRINCE dealers and others at this time unknown to LOMBARD's, conspired to maintain the resale prices of the 'Price Precision Graphite', the 'Prince J/R Pro', and the 'Prince Magnesium Pro' tennis racquets and terminate pricecutters. In furtherance of that conspiracy, and in response to dealer complaints, PRINCE has prevented LOMBARD's from making wholesale and mail order sales of the three (3) new tennis racquets by refusing to fill LOMBARD's purchase orders for these new tennis racquets.
>
> 11. Upon information and belief, PRINCE, together and with PRINCE dealers and others at this time unknown to LOMBARD's, have attempted, and are now attempting, to prevent LOMBARD's from making wholesale and mail order sales of the 'Prince Precision Graphite', the 'Prince J/R Pro' and the 'Prince Magnesium Pro' tennis racquets not to achieve any

> legitimate business objectives, but for the sole purpose of unlawfully preventing LOMBARD's from engaging in intrabrand price competition with other dealers in those same tennis racquets. (App. D-5).

About the only thing that was clear from the Amended Complaint was that, again, LOMBARD'S was merely challenging the manufacturer's right to unilaterally refuse to sell the new tennis racquet models through mail-order and wholesale operations such as LOMBARD'S. In the Amended Complaint itself, LOMBARD'S conceded:

> 9. The clear purpose of the proposed written agreement is to prevent LOMBARD'S's from selling the specified tennis racquet through the mail-order and/or wholesale operations of LOMBARD'S's. (App. D-4).

In its Order granting Motion to Dismiss Amended Complaint, the trial court accurately summed up the operative allegations of the Amended Complaint: "In the present case, all that has been alleged is that PRINCE has committed a unilateral act in furtherance of a conspiracy with unknown persons." (App. E-3).

REASONS FOR DENYING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS AFFIRMING THE DISTRICT COURT'S DISMISSAL UNDER RULE 12(B)(6) OF LOMBARD'S'S ANTITRUST COMPLAINT FOR FAILURE TO ALLEGE ANY FACTS DEMONSTRATING A CONSPIRACY, INCLUDING THE IDENTIFICATION OF ANY ALLEGED CO-CONSPIRATOR, AND THE DISTRICT COURT'S REFUSAL TO PERMIT ONE DEPOSITION PRIOR TO THE DISMISSAL DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *HOSPITAL BUILDING COMPANY V. TRUSTEES OF REX HOSPITAL*, 425 U.S. 738, 96 S.CT. 1848, 48 L.ED 2D 338 (1976), OR WITH THE DECISION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT IN *LITTLEJOHN V. SHELL OIL COMPANY*, 456 F.2D 225 (5TH CIR. 1972), OR WITH THE DECISION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT IN *INVESTMENT PROPERTIES INTERNATIONAL, INC. V. IOS, LTD.*, 459 F.2D 705 (2D CIR. 1972).

The decision of the Court of Appeals is consistent with the proposition that an invalid antitrust claim will not entitle a disappointed would-be distributor to conduct a proverbial fishing expedition in an effort to defeat a manufacturer's proposed legitimate marketing policies. The Court of Appeals relied on abundant authority in

holding first, that a conclusory allegation of conspiracy to restrain trade will not survive a motion to dismiss, 753 F.2d at 975, and second, that the trial court's exercise of discretion regarding discovery orders will be affirmed absent a showing of an abuse of that discretion, *id.* at 976.

Relying on *Quality Foods v. Latin American Agrobusiness Development Corporation*, 711 F.2d 989 (11th Cir. 1983), the Court of Appeals held: "enough data must be pleaded so that each element of the alleged antitrust violation can be properly identified." 753 F.2d at 975. In *Quality Foods* the Eleventh Circuit found that the third amended complaint being examined contained sufficient factual allegations to satisfy the elements of a Section 2 Sherman Act claim. 711 F.2d at 996.

Larry R. George Sales Company v. Cool Attic Corp., 587 F.2d 266, 273-74 (5th Cir. 1979); *Quinonoz v. National Asso. of Securities Dealers, Inc.*, 540 F.2d 824, 826-28 (5th Cir. 1976); and *City of Gainesville v. Florida Power & Light Co.*, 488 F.Supp. 1258, 1263 (S.D. Fla. 1980) were also cited by the Court of Appeals to support its holding that conclusory allegations of conspiracy to restrain trade were inadequate to give PRINCE fair notice of LOMBARD'S' claim. 753 F. 2d at 975. Likewise, cases from three circuits were cited in support of the well established proposition that the appropriate standard of review for a trial court's discovery orders is the "abuse of discretion standard."[3]

[3]See cases cited at 753 F.2d at 976.

A. Failure to State a Claim

In *Hospital Building Company v. Trustees of Rex Hospital*, 425 U.S. 738, 86 S.Ct. 1848, 48 L.Ed.2d 338 (1976), this Court addressed the pleading standards applicable to a Sherman Act claim in the context of whether a sufficient nexus with interstate commerce had been alleged. The Court of Appeals for the Fourth Circuit held that the provision of hospital services was only a "local" activity, and that the Amended Complaint did not adequately allege a "substantial effect" on interstate commerce. *Hospital Building Company v. Trustees of Rex Hospital*, 511 F.2d 678, 682, 684 (4th Cir. 1975). The Amended Complaint in *Trustees of Rex Hospital* alleged numerous facts supporting a close nexus with interstate commerce. As observed by this Court:

> According to the amended complaint, petitioner purchases a substantial portion—up to 80% of its medicines and supplies from out-of-state sellers. In 1972, it spent $112,000 on these items. A substantial number of the patients at Mary Elizabeth Hospital, it is alleged, come from out of State. Moreover, petitioner claims that a large proportion of its revenue comes from insurance companies outside of North Carolina or from the Federal Government through the Medicaid and Medicare programs. Petitioner also pays a management service fee based upon its gross receipts to its parent company, a Delaware corporation, based in Georgia. Finally, petitioner has developed plans to finance a large part of the planned $4,000,000 expansion through out-of-state lenders. All of

> these involvements with interstate commerce, the amended complaint claims, have been and are continuing to be adversely affected by respondents' anticompetitive conduct. *Trustees of Rex Hospital*, 425 U.S. at 741.

The conclusory allegations of Petitioner's claim are woefully deficient when compared to the facts alleged by Hospital Building Company in its claim. Significantly, in *Trustees of Rex Hospital, supra*, the amended complaint named several co-conspirators as defendants and named the balance of the co-conspirators, although not as defendants. The decision of the Court of Appeals in the instant case is, therefore, entirely consistent with the decision of the Court in *Trustees of Rex Hospital.*

Although Petitioner does not contend that the decision of the Court of Appeals conflicts with this Court's decision in *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), Petitioner repeatedly invokes language from *Conley* as if it had talismanic significance without ever addressing, let alone focusing on, the facts of the case. In *Conley, supra*, black members of the local union of the Brotherhood of Railway & Steamship Clerks alleged a breach by their union of its duty of fair representation under the Railway Labor Act, 45 U.S.C. §151. The general allegation of the complaint was that the petitioners were discharged wrongfully by the railroad and that the union, acting according to plan, refused to protect their jobs as it did those of white employees, or to help them with their grievances, all because they were blacks. 355 U.S. at 46. However, unlike LOMBARD'S, the plaintiffs in *Conley, supra*, made specific factual allegations to support their general

allegations. This Court summarized the allegations of the complaint as follows:

> Petitioners were employees of the Texas and New Orleans Railroad at its Houston freight house. Local 28 of the Brotherhood was the designated bargaining agents [sic] under the Railway Labor Act for the bargaining unit to which petitioners belonged. A contract existed between the union and the railroad which gave the employees and the bargaining unit certain protection from discharge and loss of seniority. In May 1954, the railroad purported to abolish 45 jobs held by petitioners or other Negroes, all of whom were either discharged or demoted. In truth, the 45 jobs were not abolished at all, but instead filled by whites as the Negroes were ousted, except for a few instances where Negroes were rehired to fill their old jobs but with loss of seniority. Despite repeated pleas by petitioners, the union, acting according to plan, did nothing to protect them against these discriminatory discharges and refused to give them protection comparable to that given white employees. *Id.* at 43.

Thus, the standard of pleading actually applied in *Conley* was also properly applied by the Court of Appeals below. Thus, even if Petitioner contended that the decision below conflicts with *Conley*, which Petitioner has not, Petitioner would be in error.

Moreover, as Respondent argued in the District Court and in the Court of Appeals, the Amended

Complaint failed to allege the elements of a Sherman Act dealer termination claim as established by this Court in *Monsanto Company v. Spray-Rite Service, Corporation*, ____ U.S. ____, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984). *Monsanto, supra*, held that something more than evidence of competitors' complaints is necessary in order to establish concerted action; that there must be evidence which tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently. 104 S.Ct. at 1471. As will be seen, it is especially important in this case to distinguish between what the Petitioner alleged in its Amended Complaint and what it failed to allege. Basically, however, Petitioner alleged that as a result of its refusal to enter into the Retail Agreement it was prohibited from selling two (and later three) *new* tennis racquets.[4] Petitioner also alleged that for several years prior to January, 1984, it purchased large quantities of tennis racquets from Respondent for resale in Petitioner's retail, wholesale and mail-order business operations. (App. D-3). Petitioner did not allege that it was terminated as a distributor or that it was no longer able to sell the "large quantities" of tennis racquets supplied by Respondent. Nor did Petitioner allege that either it alone (or it along with other alleged price-cutters) was required to enter into the Retail Agreement while its competitors who sold at higher prices were not so required. Acting in good faith, Petitioner did not make such allegations despite the District Court's two Orders specifically referring to this Court's decision in *Monsanto*. The Court of Appeals was correct in affirming the District Court's dismissal of this action since the Petitioner failed to allege any fact or combination of facts which would

[4]Plaintiff's material allegations are reprinted *supra* at p.9.

tend to exclude the possibility that the Respondent's decision to introduce its new and revolutionary products on a face-to-face basis was anything other than unilateral. *Monsanto* put to rest the notion that mere evidence of dealer complaints was sufficient to raise an inference of a vertical price-fixing conspiracy. *Monsanto* teaches that something more than mere dealer complaints is necessary, particularly in the total absence of other facts and the failure to identify any other alleged co-conspirator.

B. Discovery Order

The Court of Appeals correctly held that the District Court did not abuse its discretion by granting Respondent's Motion for a Protective Order regarding the deposition of ANA L. APRIL until the Petitioner alleged facts sufficient to state a claim. When the District Court was presented with Respondent's Motion for Protective Order, it had already dismissed the original Complaint against PRINCE and CHESEBROUGH-PONDS, INC. The District Court had seen first hand the Complaint's total lack of specificity and its conclusory allegations of conspiracy. It had also noted the Petitioner's "inadvertent" claim of monopolization and its subsequent withdrawal. Moreover, the District Court was sensitive to numerous other potentially fatal defects in Petitioner's theory of antitrust violations, which it admonished Petitioner to consider before refiling.

In light of its experience with the original Complaint, the District Court had good cause to be concerned that the Amended Complaint might be equally defective and subject to dismissal, for, as Respondent's Motion

to Dismiss pointed out, the Amended Complaint was fundamentally the same as the original Complaint, albeit less specific. Indeed, while maintaining that Respondent had conspired with "others at this time unknown" it had dropped all references to CHESEBROUGH POND'S, INC. Until it could consider the Amended Complaint more closely and the arguments concerning the Motion to Dismiss applicable to it, the District Court acted prudently in temporarily excusing Respondent's marketing representative from a scheduled deposition.

Petitioner contends that the decision of the Court of Appeals holding that the District Court did not abuse its discretion under the circumstances set out above conflicts with *Littlejohn v. Shell Oil Company*, 456 F.2d 225 (5th Cir. 1972), vacated on other grounds, 483 F.2d 1140 (5th Cir., en banc, 1973), 414 U.S. 1116, 94 S.Ct. 849 (1973), and with *Investment Properties International, Inc. v. IOS, Ltd.*, 459 F.2d 705 (2d Cir. 1972).

As a threshold matter, an intra-circuit conflict, as opposed to an inter-circuit conflict, is not a basis for this Court to exercise its discretion to grant a Petition for a Writ of Certiorari. *See, e.g., United States v. Union Central Life Insurance Co.*, 368 U.S. 291, 82 S.Ct. 349, 7 L.Ed.2d 294 (1961); Rule 17.1, Rules of the Supreme Court of the United States. *Littlejohn, supra*, is binding precedent on the Eleventh Circuit since it was decided by the "old Fifth" Circuit in 1972, long before the Eleventh Circuit's decision in *Bonner v. City of Pritchard*, 661 F.2d 1206 (11th Cir. 1981).[5] Thus the

[5]In *Bonner*, the Eleventh Circuit held that decisions of the United States Court of Appeals for the Fifth Circuit prior to September 30, 1981, were binding as precedent in the Eleventh Circuit. *Id.* at 1207.

opportunity to resolve any purported conflict between *Littlejohn* and the decision of the Court of Appeals below was properly presented to the Eleventh Circuit through Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc. The Eleventh Circuit implicitly found no conflict when it denied said petition and suggestion on May 30, 1985.[6] However, even if this Court were to consider whether the decision of the Court of Appeals conflicts with *Littlejohn*, it would find, as demonstrated below, that the alleged conflict does not exist.

Petitioner has attempted to portray *Littlejohn* as a decision prohibiting the entry of summary judgments for the defendants without affording the plaintiff an adequate opportunity to conduct discovery. Examining the panel decision in conjunction with the *en banc* decision, reveals that the issue presented and decided was whether the sales transactions challenged under the Robinson-Patman Act, 15 U.S.C. §13(a), must occur "in commerce." The District Court concluded that the Robinson-Patman Act required that the challenged transaction occur in commerce and therefore granted summary judgment for the defendants since there were neither allegations nor proof that the challenged sales moved in interstate commerce. 326 F.Supp. 45 (N.D. Tex. 1971). Following dicta from this Court's decision in *Moore v. Mead's Fine Bread Company*, 348 U.S. 115, 75 St.Ct. 148, 99 L.Ed. 145 (1954), the Fifth Circuit reversed, holding:

---

[6]Alternatively, Petitioner may have failed to present the Eleventh Circuit with an opportunity to resolve the purported conflict.

> A complaint under the Robinson-Patman Act need not *allege* that one of the sales involved was interstate in character as long as it charges that interstate sales were used to underwrite allegedly discriminatory intrastate price-cutting tactics. 456 F.2d at 226. (Emphasis supplied).

The panel's holding was vacated and the *en banc* court squarely held that the District Court was without subject matter jurisdiction under the Robinson-Patman Act "absent proof that at least one of each of the defendants [sic] challenged sales transactions occurred in commerce." 483 F.2d at 1142 (footnote omitted). However, due to the confusion in the state of the law regarding the necessary elements for a Robinson-Patman claim, the cloudy procedural status of the case, and "out of an abundance of caution and to prevent a possible injustice", the court allowed the plaintiff to:

> . . . amend its complaint to specifically allege that at least one of the sales in question with respective to each defendant was in commerce, and that discovery must then be directed and limited to seeking proof in support of that jurisdictional allegation. *Id.* at 1146.

Unlike *Littlejohn*, where there was confusion over the elements of a Robinson-Patman claim, there was no confusion in the instant case concerning the applicable law. Petitioner itself argued this Court's then recent *Monsanto* decision would apply. Nevertheless, again in the Amended Complaint Petitioner failed to allege a prima facie claim based on the elements enunciated by

this Court in *Monsanto*. Then, upon suffering its second dismissal Petitioner elected to appeal.

B. **Deposition of Ana April**

Petitioner also contends that the Court of Appeals' holding on the discovery issue conflicts with *Investment Properties International, Inc. v. IOS, Ltd., supra*. Again, Petitioner cites dicta from what is allegedly conflicting authority without the slightest degree of analysis of the underlying facts. In *IOS, Ltd., supra*, there was no dispute concerning the adequacy of the allegations. The District Court denied a request for preliminary relief based on "sharp disputes" concerning the dates and places of the transactions alleged to form the basis of jurisdiction. 459 F.2d at 707-08. The court went so far as to indicate that the plaintiffs "could profit from discovery." See CCH Fed.Sec.L.Rep. ¶93,011, at 90,733 (1971). However, when plaintiffs tried to take that discovery, a different district judge granted the defendants' motion to vacate plaintiffs' notice of taking deposition. Apparently, the court was persuaded by the claim of the defendants that the prosecuting plaintiff had "access to information which should have enabled him to make at least a minimal showing of a basis of jurisdiction." 459 F.2d at 708. The plaintiffs argued in opposition that the prosecuting plaintiff became the president of the plaintiff corporation after the transactions purportedly supporting jurisdiction had occurred and that, therefore, the truth of the complaint's allegations lay solely within the knowledge and control of the defendants. The Second Circuit was obviously correct in determining that the District Court's failure to allow the plaintiff to proceed with discovery and to prove its

jurisdictional allegations was error justifying a writ of mandamus.

IOS, Ltd. addressed a situation where the plaintiff was foreclosed by the District Court from using discovery to prove allegations deemed sufficient to state a claim. The case at bar is wholly different. Here the Petitioner went fishing for facts which it hoped might enable it to adequately plead a valid antitrust claim, something it had not done and as a matter of law could not do. The subject Distribution Agreement represented lawful exercise of a manufacturer's right to propose methods of distributing its products to maximize customer satisfaction and enhance goodwill. Petitioner was never placed in a "cul de sac." Thus, there is no conflict between *IOS, Ltd.* and the decision of the Court of Appeals below.

II.

THE DECISION OF THE COURT OF APPEALS AFFIRMING THE DISTRICT COURT'S DISCOVERY ORDER DOES NOT CONFLICT WITH THE DECISION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT IN *SALTER V. UPJOHN COMPANY*, 593 F.2D 649 (5TH CIR. 1979).

Again, Petitioner contends that there is an *inter-circuit* conflict when there is not. The decision of the Court of Appeals is said to conflict with a decision of the "old Fifth" Circuit which, of course, was binding on the Court of Appeals below. *Bonner v. City of Pritchard, supra.* Thus, even if the two decisions conflict, which they clearly do not, as demonstrated below such an

alleged conflict would not form the basis for this Court's exercise of its discretion to grant the Petition for a Writ of Certiorari.

Petitioner contends that the opinion of the Court of Appeals below receded from the "extraordinary circumstances" standard adopted by the Fifth Circuit in *Salter, supra*, and reverted to a simple "abuse of discretion" standard for reviewing a protective order such as the one granted in the instant case. First, Petitioner's focus on the phrase "extraordinary circumstances" from *Salter* is misleading. The phrase Petitioner emphasizes was merely an observation made by the Court in *Salter*:

> It is very unusual for a court to prohibit the taking of a deposition altogether and absent extraordinary circumstances, such an order would likely be in error. 593 F.2d at 651.

The Court went on to state, however:

> We do not believe that this first order of the trial judge was such a complete prohibition, however. *Id.*

Again, the facts of the decision cited do not support the tortured interpretation put forward by Petitioner.

In *Salter, supra*, the plaintiff was attempting to take the deposition of the president of the defendant corporation, Dr. Hubbard. The District Court granted the defendant corporation's motion for protective order regarding the first notice of taking deposition. However, the Order merely required the plaintiff to depose other

corporate employees that the defendant indicated had more knowledge of the facts *before deposing* its president. *Id.* The District Court clearly indicated that if the testimony of the other employees was unsatisfactory, the plaintiff would be allowed to take the deposition of the corporation's president. As the Fifth Circuit observed: We do not interpret this ruling as totally prohibiting plaintiff from taking Dr. Hubbard's deposition." *Id.* Thus, the "extraordinary circumstances" language is pure dicta.

Indeed, as pointed out by Petitioner, the Court of Appeals below discussed *Salter* in a footnote when it held there was no abuse of discretion by the District Court. The decision of the Court of Appeals below states:

> *Salter v. Upjohn Company*, 593 F.2d 649, 651 (5th Cir. 1979), refers to a requirement of extraordinary circumstances to deny the taking of a deposition. We do not consider that it states a different standard than the accepted abuse of discretion standard. 753 F.2d at 976, n.11.

Even a cursory reading of *Salter* shows that it indeed followed the accepted abuse of discretion standard. In *Salter*, the Fifth Circuit states no less than five times that the trial judge was exercising his discretion, or that the decision to postpone Dr. Hubbard's deposition was within the trial judge's discretion, or that he otherwise did not abuse his discretion in ruling on the discovery motions addressed to the taking of Dr. Hubbard's

deposition. In fact, in its concluding paragraph, the Court stated:

> Because the judge was justified in postponing Dr. Hubbard's deposition the first time plaintiff requested it, and because plaintiff did not properly reassert the request, *the district judge did not abuse his discretion in preventing the deposition any of the three times plaintiff sought to take it. The judgment of the District Court is therefore AFFIRMED. Id.* at 652. (Emphasis supplied).

The Petitioner's references to "the Salter doctrine," "the general rule in Salter," and "the Salter 'extraordinary circumstances' standard" are thus wholly misleading and unfounded.

CONCLUSION

The decision of the Court of Appeals is consistent with the pleading standards of this Court and well established precedent in the Eleventh Circuit. When the cases cited in the Petition are analyzed, rather than merely cited, it is evident that none of them conflicts with the pleading standard applied in the decision below. Therefore, the questions presented to this Court by the Petition, or as revised by this Response, must be answered in the negative. Since the Petitioner has not presented any other reasons to support this Court's exercise of its discretion in favor of granting the subject Petition, the Petition should be denied.

Moreover, Petitioner's attempt to create an "extraordinary circumstances" standard for review of a District Court discovery order is without foundation in law or policy. Rather it appears to be Petitioner's method of asking this Court to review a discovery order already found by the Eleventh Circuit to be within the District Court's discretion.

WHEREFORE, for the above reasons, Respondent PRINCE respectfully prays that the Petition for Writ of Certiorari be denied.

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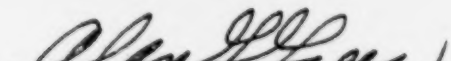
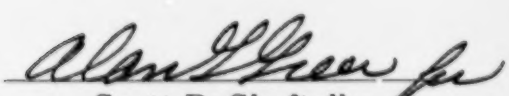
By: 
Alan G. Greer

By: 
Scott D. Sheftall

By: _____
Alan S. Fine

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Response to Petition for Writ of Certiorari was mailed to: Lawrence R. Metsch, Esq., and Lydia A. Fernandez, Esq., Hauser and Metsch, P.A., Attorneys for LOMBARD'S, Suite 1070, 4770 Biscayne Boulevard, Miami, Florida 33131-3237, this 17th day of December, 1985.

By: Alan D. Green for
Scott D. Sheftall

Appendix

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 84-0465 CIV-JLK

LOMBARD'S INC.,
a Florida corporation,

Plaintiff,

vs.

PRINCE MANUFACTURING INC.,
a foreign corporation,
and CHESEBROUGH-POND'S INC.,
a foreign corporation,

Defendants.

COMPLAINT

Plaintiff LOMBARD'S INC. ("LOMBARD'S") sues Defendants PRINCE MANUFACTURING INC. ("PRINCE") and CHESEBROUGH-POND'S INC. ("C-P") and alleges the following:

JURISDICTION

1. This is a complaint for treble damages and injunctive relief under the antitrust laws of the United States, 15 U.S.C. 1, et seq. This Court has jurisdiction of this action under 15 U.S.C. 15, 22 and 26 and the action is brought as a result of the Defendants' violations

of Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 15 U.S.C. 3.

THE PARTIES

2. LOMBARD'S is a corporation organized and existing under the laws of the State of Florida. It maintains its principal place of business in Dade County, Southern District, Florida. LOMBARD'S is engaged in the business of retail, wholesale and mail order sales of sporting goods, including tennis racquets.

3. PRINCE is a foreign corporation with its principal place of business located in Princeton, New Jersey. PRINCE is engaged in the business of manufacturing sporting goods, including tennis racquets, and is found and transacts substantial business in the Southern District of Florida. PRINCE is a wholly-owned subsidiary of C-P.

4. C-P is a foreign corporation with its principal place of business located outside the State of Florida, C-P owns all of the stock of PRINCE. C-P is found and transacts substantial business in the Southern District of Florida.

5. As further set forth in the succeeding portions of this complaint, PRINCE and C-P, together and with others at this time unknown to LOMBARD'S, have engaged, and are now engaging, in an unlawful combination and conspiracy to restrain interstate trade and commerce and have unlawfully attempted to restrain interstate trade and commerce, in violation of Sections 1 and 2 of the Sherman Act.

THE FACTS

6. LOMBARD'S operates two (2) retail establishments at which it sells sporting goods, including tennis racquets, to the general public. One (1) such retail establishment is located in Dade County, Florida, and the other retail establishment is located in Broward County, Florida. In addition, LOMBARD'S operates a mail order business in Dade County, Florida, in which it makes retail sales of sporting goods, including tennis racquets, to several mass merchandisers which, in turn, sell those sporting goods, including tennis racquets, to retail customers throughout the United States. LOMBARD'S for many years has sold sporting goods, including tennis racquets, at prices significantly below those suggested by the manufacturers of such sporting goods.

7. PRINCE and C-P are engaged in the business of manufacturing sporting goods, including tennis racquets, which are sold throughout the world. Because of their superior design and market skills, PRINCE and C-P have achieved a commanding position in the sporting goods field, particularly in the highly profitable market for so-called "oversized" tennis racquets.

8. For several years, LOMBARD'S has purchased large quantities of tennis racquets from PRINCE and C-P for resale in LOMBARD'S' retail, wholesale and mail order business operations. The importance to LOMBARD'S of its tennis racquets manufactured by PRINCE and C-P has grown over the last several years to the point where LOMBARD'S generates a substantial portion of its profits from sales of such tennis racquets. If LOMBARD'S were to find itself unable to sell the

tennis racquets manufactured by PRINCE and C-P, the ability of LOMBARD'S to survive would be severely jeopardized.

9. Effective January, 1984, PRINCE and C-P introduced two (2) new tennis racquets to the public. The first such tennis racquet, named the "Prince Precision Graphite," is being offered and sold to dealers, such as LOMBARD'S, at a price of $80.00 each, with a suggested retail price of $135.00 each. The second such tennis racquet, named the "Prince J/R Pro," is being offered and sold to dealers, such as LOMBARD'S, at a price of $29.50 each, with a suggested retail price of $49.50 each.

10. PRINCE and C-P have asked LOMBARD's to enter into a written agreement, a copy of which is attached hereto as Exhibit "A", whereby LOMBARD'S would contractually bind itself to make no sales of the "Prince Precision Graphite" tennis racquet and/or the "Prince J/R Pro" tennis racquet other than through the retail establishments operated by LOMBARD'S. The clear purpose of the proposed written agreement is to prevent LOMBARD'S from selling the specified tennis racquets through the mail order and/or wholesale operations of LOMBARD'S. LOMBARD'S has refused to sign the proposed written agreement and PRINCE and C-P have refused to fill purchase orders for the two (2) new tennis racquets submitted by LOMBARD'S solely because LOMBARD'S has refused to sign the proposed written agreement.

11. PRINCE and C-P have attempted, and are now attempting, to prevent LOMBARD'S from making wholesale and mail order sales of the "Prince Precision

Graphite" and the Prince J/R Pro" tennis racquets not to achieve any legitimate business objecties, but for the sole purpose of unlawfully preventing LOMBARD'S from engaging in intrabrand price competition with other dealers in those same tennis racquets.

12. LOMBARD'S has already suffered great injury to its business, good will, reputation, and relationship with past and future customers because it has been unable to purchase from PRINCE and C-P the "Prince Precision Graphite" and the "Prince J/R Pro" tennis racquets on terms and conditions which do not violate Sections 1 and 2 of the Sherman Act. Should LOMBARD'S, in the future, be unable to purchase from PRINCE and C-P the "Prince Precision Graphite" and the Prince J/R Pro" tennis racquets on terms and conditions which do not violate Sections 1 and 2 of the Sherman Act, it will suffer additional injury to its business, good will, reputation and relationship with past and future customers. The public has already been harmed and will, in the future, continue to be harmed, by the above-described unlawful policies and practices of PRINCE and C-P because competition throughout the United States will be suppressed or eliminated.

13. As a direct result of the above-described unlawful acts by PRINCE and C-P, LOMBARD'S has already suffered, and will continue to suffer, substantial damages.

14. LOMBARD'S has no adequate remedy at law.

15. LOMBARD'S demands trial by jury of all issues so triable.

WHEREFORE, LOMBARD'S prays:

A. That a preliminary and permanent injunction issue restraining PRINCE and C-P from conditioning their sales of the "Prince Precision Graphite" and/or the "Prince J/R Pro" tennis racquets to LOMBARD'S upon the execution by LOMBARD'S of the proposed agreement, a copy of which is attached hereto as Exhibit "A".

B. That a preliminary and permanent injunction issue restraining PRINCE and C-P from in any manner restricting or limiting their sales of the "Prince Precision Graphite" and/or the "Prince J/R Pro" tennis racquets to LOMBARD's for reasons or motives which violate Sections 1 and 2 of the Sherman Act.

C. That LOMBARD'S recover from PRINCE and C-P treble damages, plus costs and counsel fees.

D. That LOMBARD'S have such further and other relief as is just and proper.

HAUSER AND METSCH, P.A.
Attorneys for LOMBARD'S
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(305) 576-1177

By: /s/ LAWRENCE R. METSCH
LAWRENCE R. METSCH

By: /s/ LYDIA A. FERNANDEZ
LYDIA A. FERNANDEZ

PRINCE PRECISION GRAPHITE AND J/R PRO RETAIL AGREEMENT

Retailer: _____

_____

_____

_____

The above named retailer ("Retailer") hereby makes application to Prince Manufacturing, Inc. ("Prince") to become an authorized retailer of Prince's Prince Precision Graphite and Prince J/R Pro tennis racquets. In this regard, Retailer represents and agrees as follows:

1. Retailer maintains a retail store open on a regular basis to members of the public, or maintains a tennis pro shop open on a regular or seasonal basis to members of the public and/or members of an affiliated club, in each case for the transaction of retail business in tennis equipment over the counter.

2. Retailer has qualifed personnel available to advise customers as to the concept underlying the Prince "full-size" racquet, including the special advantages of its unique construction, and as to the proper selection of racquets, grip size, strings and string tension. Retailer also has facilities or arrangements available for the stringing of racquets and may maintain a supply of demonstration racquets for use by customers.

3. Any Prince Precision Graphite or J/R Pro racquets sold by Prince to Retailer will be resold only over the counter to retail customers who have physically come to the retail store or pro shop.

4. Retailer, prior to any such resale, will, through qualified personnel, offer such customer the opportunity to feel the heft of a Prince racquet, provide advice in person on the Prince concept, an appropriate grip size, string and string tension and make such retail customer aware of the availability, if applicable, of a demonstration Prince Precision Graphite or J/R Pro racquet for trial.

5. Retailer understands Prince believes that the good will of tennis players towards Prince can depend in part upon their understanding of the concept behind the "full-size" Prince racquet, their purchase of a racquet as best suited to their game as will result from the personal advice of qualified personnel and trial, including the feel of the heft and light weight of the Prince racquet, before purchase.

6. Retailer also understands that a friendly and personal response to any customer complaint can play an important role in maintaining good will. Retailer will therefore encourage complaining customers to bring racquets to Retailer first for possible minor service or for assistance in returning racquets to Prince for warranty handling.

7. Retailer understands that if this application is approved and Prince commences selling Prince Precision Graphite and/or Prince J/R Pro racquets to Retailer, such sales may be discontinued at any time for Retailers failure to observe the commitments made above, failure to meet credit requirements or other business or promotional goals of Prince, or because Prince determines to discontinue business generally with Retailer.

_____
Retailer

Application Approved:

_____
Sales Representative

_____
Vice President
Prince Manufacturing, Inc.

_____
Date

EXHIBIT "A"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 84-0465-CIV-JLK

LOMBARD'S INC., a Florida corporation,
Plaintiff,

vs.

PRINCE MANUFACTURING INC.,
a foreign corporation, and
CHEESBROUGH-POND'S INC.,
a foreign corporation.
Defendants

ORDER OF DISMISSAL

THIS CAUSE comes before the court upon the defendants' Motion to Dismiss.

The underlying facts of this law suit are that plaintiff operates two retail establishments which sell sporting goods. In addition, the plaintiff also operates a mail order business that retails sporting goods throughout the United States. The defendant PRINCE is a sporting goods manufacturer and the defendant CHEESBROUGH-POND'S owns all the stock of PRINCE. The plaintiff alleges that because of the defendant's "superior design and market skills", the defendants have achieved a commanding position in the sporting goods field. For several years the plaintiff has purchased large quantities of tennis racquets from the defendants. PRINCE has now begun marketing two new tennis racquets but has refused to distribute these new racquets to retailers unless the retailers agree to sell the racquets only in

person so that the customer can be given personal service and advice on such things as the PRINCE concept, grip size and grip tension. The restrictive agreement also requires personal contact between the retailer and the purchaser so that any customer complaints can be handled in a manner conducive to the maintance of good will.

In the complaint, the plaintiff challenges the restrictive agreement as being in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 3. Specifically, the plaintiff contends that PRINCE and its parent corporation have conspired and combined to restrain trade and commerce. Beyond this conclusory contention, the complaint alleges that the defendants' have implemented the restrictive agreement in order to prevent the plaintiff from selling the new racquets at a reduced price through its mail order business. The plaintiff contends that the non-price restrictions of the agreement are intended by the defendants to restrain *intra*-brand competition.

In support of the motion to dismiss, the defendants have explained that the non-price restrictions contained in the new agreement are intended to insure good customer service as part of an overall marketing scheme. The defendants contend that the only connection alleged between CHEESBROUGH-POND'S and the Retail Agreement is by way of CHEESBROUGH-POND'S stock ownership of PRINCE. The defendant's argue that the complaint's conclusory allegations of a combination or conspiracy are not sufficient to satisfy the notice pleading requirement of rule 8(a) of the Federal Rule of Civil Procedure.

The defendants next argue that to properly allege an intra-enterprise conspiracy the complaint must allege something more than just separate incorporation of the parent and subsidiary. The defendants challenge the complaint in this action as having alleged only that PRINCE and CHEESBROUGH-POND'S are connected by the fact of stock ownership. The defendants contend that the plaintiffs have not alleged that "something more", such as conspiratorial statements, competition between the parent and subsidiary or pursuit of separate economic interests in their combined refusal to trade with the plaintiff, which must be alleged to state a cause of action for intra-enterprise conspiracy.

The defendants' final challenge to the complaint, as it attempts to state a cause of action under Section 1 of the Sherman Act, is that the complaint attempts to state a claim for non-price vertical restraint but that the complaint does not allege significant harmful effects on interbrand competition. The defendants argue that a solitary allegation of a lessening of *intra*brand competition does not state a cause of action under the antitrust laws.

The defendants also support their motion to dismiss by arguments challenging the complaint's allegations under Section 2 of the Sherman. However, the plaintiffs now state that their claim arises only under Section 1 of the Act and that any reference in the complaint to Section 2 was inadvertent. The court agrees with the defendants that the complaint clearly states that it objects to the Retail Agreement as being in violation of both Section 1 and 2. The plaintiffs statement restricting their claim to Section 1 will be treated as an intention to withdraw the previously stated claims of Section 2.

Since the plaintiff has not moved to amend the complaint so as to remove the Section 2 claim, the court will accept the plaintiffs statement as an agreement to the defendant's motion to dismiss the Section 2 claims. On this basis, the court will grant the defendants' motion as to the Section 2 claim.

In response to the Motion to Dismiss, the plaintiff states that the defendants' Motion to Dismiss has astonishingly ignored *Monsanto Co. v. Spray-Rite Service Corporation*, 52 U.S.L.W. 4341 (March 20, 1984). However, the court does not believe that the *Monsanto* decision is of much help in addressing the Motion to Dismiss. *Monsanto* is expressly limited to the sufficiency of proof in a concerted price fixing case. The only part of *Monsanto* that is really pertinent to this case is that the Court distinguished the concerted price fixing case from the concerted non-price restriction case now before the bar. Since the plaintiff makes it clear in its Memorandum in Opposition, page 7 note 1, that this case is not now a price fixing case, Monsanto is not very helpful in considering this motion.

The court, having considered the memoranda of the parties, finds that it need not reach all the issues raised. The court finds that the complaint does not satisfy the standard of pleading established by *Quality Foods v. Latin Am. Agribusiness Devel*, 711 F.2d 989 (11th Cir. 1983) and *City of Gainesville v. Florida Power & Light Co.*, 488 F.Supp. 1258 (S.D. Fla. 1980).

The complaint does not contain a short plain statement sufficient to place the defendants on notice of what the plaintiff's claim is and the grounds upon which it rests. The plaintiff's conclusory allegation of a

conspiracy to restrain trade will not survive a motion to dismiss. *Quality Foods* at 995 and *City of Gainesville* at 1263. Since the complaint fails on this ground the court need not reach the more specific questions raised by the defendants. However, the plaintiff might be well advised to consider the other issues if it should decide to amend the complaint.

Accordingly, the court does:

ORDER and ADJUDGE that the defendants' Motion to Dismiss be, and it is, GRANTED. This action is DISMISSED.

DONE and ORDERED in chambers at the United States Courthouse, Miami, Dade County, Florida this 3rd day of May, 1984.

/s/ JAMES LAWRENCE KING
JAMES LAWRENCE KING
U.S. DISTRICT JUDGE

cc. Scott D. Sheftall
Lawrence R. Metsch

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 84-465-CIV-JLK

LOMBARD'S, INC., a Florida corporation,

Plaintiff,

vs.

PRINCE MANUFACTURING, INC.,
a foreign corporation,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR PROTECTIVE ORDER PENDING RULING ON MOTION TO DISMISS AMENDED COMPLAINT

This cause arises before the court upon defendant's Motion for a Protective Order excusing the appearance and deposition of its marketing representative, Ana April.

Plaintiff has not responded in opposition.

Accordingly, since defendant's motion is premised on the deficiency of the allegations in the Amended Complaint which defendant contends do not justify the taking of discovery, the court does:

ORDER and ADJUDGE that defendant's Motion be, and it is, GRANTED until such time as the court rules on the pending motion to dismiss the Amended

Complaint. The court notes that defendant's motion to stay discovery which went to the original complaint which has since been dismissed is now moot.

DONE and ORDERED in chambers at the United States Courthouse, Miami, Dade County, Florida this 16th day of July, 1984.

/s/ JAMES LAWRENCE KING
JAMES LAWRENCE KING
U.S. DISTRICT JUDGE

cc. Scott D. Sheftall
Lawrence Metsch

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. 84-0465-CIV-JLK

LOMBARD'S INC., a Florida corporation,
Plaintiff,

vs.

PRINCE MANUFACTURING INC.,
a foreign corporation,
Defendant.

AMENDED COMPLAINT

Plaintiff LOMBARD'S INC. ("LOMBARD'S") sues Defendant PRINCE MANUFACTURING INC. ("PRINCE") and alleges the following:

JURISDICTION

1. This is a complaint for treble damages and injunctive relief under the antitrust laws of the United States, 15 U.S.C. s. 1, et seq. This Court has jurisdiction of this action under 15 U.S.C. ss. 15 and 26 and the action is brought as a result of the Defendant's violations of Section 1 of the Sherman Act, 15 U.S.C. s. 1.

THE PARTIES

2. LOMBARD'S is a corporation organized and existing under the laws of the State of Florida. It maintains its principal place of business in Dade County, Southern District, Florida. LOMBARD'S is engaged in the business of retail, wholesale and mail order sales of sporting goods, including tennis racquets.

3. PRINCE is a foreign corporation with its principal place of business located in Princeton, New Jersey. PRINCE is engaged in the business of manufacturing sporting goods, including tennis racquets, and is found and transacts substantial business in the Southern District of Florida.

4. As further set forth in the succeeding portions of this amended complaint, upon information and belief, PRINCE, together and with PRINCE dealers and others at this time unknown to LOMBARD'S, have engaged, and are now engaging, in an unlawful combination and conspiracy to fix the resale prices of PRINCE tennis racquets and to restrain interstate trade and commerce, in violation of Section 1 of the Sherman Act.

THE FACTS

5. LOMBARD'S operates two (2) retail establishments at which it sells sporting goods, including tennis racquets, to the general public. One (1) such retail establishment is located in Dade County, Florida, and the other retail establishment is located in Broward County, Florida. In addition, LOMBARD'S operates a mail order business in Dade County, Florida, in which

it makes retail sales of sporting goods, including tennis racquets, to customers throughout the United States. Finally, LOMBARD'S sells sporting goods, including tennis racquets, to several mass merchandisers which, in turn, sell those sporting goods, including tennis racquets, to retail customers throughout the United States. LOMBARD'S for many years has sold sporting goods, including tennis racquets, at prices significantly below those suggested by the manufacturers of such sporting goods.

6. PRINCE is engaged in the business of manufacturing sporting goods, including tennis racquets, which are sold throughout the world. Because of its superior design and market skills, PRINCE has achieved a commanding position in the sporting goods field, particularly in the highly profitable market for so-called "oversized" tennis racquets.

7. For several years, LOMBARD'S has purchased large quantities of tennis racquets from PRINCE for resale in LOMBARD'S retail, wholesale and mail order business operations. The importance to LOMBARD'S of its tennis racquets manufactured by PRINCE has grown over the last several years to the point where LOMBARD'S generates a substantial portion of its profits from sales of such tennis racquets. If LOMBARD'S were to find itself unable to sell the tennis racquets manufactured by PRINCE, the ability of LOMBARD'S to survive would be severely jeopardized.

8. Effective January, 1984, PRINCE introduced two (2) new tennis racquets to the public. The first such tennis racquet, named the "Prince Precision Graphite," is being offered and sold to dealers, such as LOMBARD'S,

at a price of $80.00 each, with a suggested retail price of $135.00 each. The second such tennis racquet, named the "Prince J/R Pro," is being offered and sold to dealers, such as LOMBARD'S, at a price of $29.50 each, with a suggested retail price of $49.50 each. In March, 1984, PRINCE introduced a third new tennis racquet to the public. The third such tennis racquet is named the "Prince Magnesium Pro."

9. PRINCE has asked LOMBARD'S to enter into a written agreement, a copy of which is attached hereto as Exhibit "A", whereby LOMBARD'S would contractually bind itself to make no sales of the "Prince Precision Graphite" tennis racquet and/or the "Prince J/R Pro" tennis racquet and/or the "Prince Magnesium Pro" tennis racquet other than through the retail establishments operated by LOMBARD'S. The clear purpose of the proposed written agreement is to prevent LOMBARD'S from selling the specified tennis racquets through the mail order and/or wholesale operations of LOMBARD'S. LOMBARD'S has refused to sign the proposed written agreement and PRINCE has refused to fill written and/or verbal purchase orders for the three (3) new tennis racquets submitted by LOMBARD'S solely because LOMBARD'S has refused to sign the proposed written agreement.

10. Upon information and belief, PRINCE, together and with PRINCE dealers and others at this time unknown to LOMBARD'S, conspired to maintain the resale prices of the "Prince Precision Graphite," the "Prince J/R Pro" and the "Prince Magnesium Pro" tennis racquets and terminate price-cutters. In furtherance of that conspiracy, and in response to dealer complaints, PRINCE has prevented LOMBARD'S from making

wholesale and mail order sales of the three (3) new tennis racquets by refusing to fill LOMBARD'S purchase orders for these new tennis racquets.

11. Upon information and belief, PRINCE, together and with PRINCE dealers and others at this time unknown to LOMBARD'S, have attempted, and are now attempting, to prevent LOMBARD'S from making wholesale and mail order sales of the "Prince Precision Graphite," the "Prince J/R Pro" and the "Prince Magnesium Pro" tennis racquets not to achieve any legitimate business objectives, but for the sole purpose of unlawfully preventing LOMBARD'S from engaging in intrabrand price competition with other dealers in those same tennis racquets.

12. LOMBARD'S has already suffered great injury to its business, good will, reputation, and relationship with past and future customers because it has been unable to purchase from PRINCE the "Prince Precision Graphite," the "Prince J/R Pro" and the "Prince Magnesium Pro" tennis racquets on terms and conditions which do not violate Section 1 of the Sherman Act. Should LOMBARD'S, in the future, be unable to purchase from PRINCE the "Prince Precision Graphite," the "Prince J/R Pro" and the "Prince Magnesium Pro" tennis racquets on terms and conditions which do not violate Section 1 of the Sherman Act, it will suffer additional injury to its business, good will, reputation and relationship with past and future customers. The public has already been harmed and will, in the future, continue to be harmed, by the above-described unlawful policies and practices of PRINCE because competition throughout the United States will be suppressed or eliminated.

13. As a direct result of the above-described unlawful acts by PRINCE, LOMBARD'S has already suffered, and will continue to suffer, substantial damages.

14. LOMBARD'S has no adequate remedy at law.

15. LOMBARD'S demands trial by jury of all issues so triable.

WHEREFORE, LOMBARD'S prays:

A. That a preliminary and permanent injunction issue restraining PRINCE from conditioning its sales of the "Prince Precision Graphite" and/or the "Prince J/R Pro" and/or the "Prince Magnesium Pro" tennis racquets to LOMBARD'S upon the execution by LOMBARD'S of the proposed agreement, a copy of which is attached hereto as Exhibit "A".

B. That a preliminary and permanent injunction issue retraining PRINCE from in any manner restricting or limiting their sales of the "Prince Precision Graphite," the "Prince J/R Pro" and/or the "Prince Magnesium Pro" tennis racquets to LOMBARD'S for reasons or motives which violate Section 1 of the Sherman Act.

C. That LOMBARD'S recover from PRINCE treble damages, plus costs and counsel fees.

D. That LOMBARD'S have such further and other relief as is just and proper.

HAUSER AND METSCH, P.A.
Attorneys for LOMBARD'S
Suite 1070
4770 Biscayne Blvd.
Miami, Florida 33137-3237
(305) 576-1177

By: _____
LAWRENCE R. METSCH

By: _____
LYDIA A. FERNANDEZ

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was delivered to Alan G. Greer, Esq., and Scott D. Sheftall, Esq., Floyd Pearson Stewart Richman Greer Weil & Zack, P.A., Attorneys for PRINCE, One Biscayne Tower, 25th Floor, Miami, Florida 33131-1868 this _____ day of May, 1984.

_____
LYDIA A. FERNANDEZ

Exhibit "A"

PRINCE PRECISION GRAPHITE AND J/R PRO RETAIL AGREEMENT

Retailer: _____

_____

_____

_____

The above named retailer ("Retailer") hereby makes application to Prince Manufacturing, Inc. ("Prince") to become an authorized retailer of Prince's Prince Precision Graphite and Prince J/R Pro tennis racquets. In this regard, Retailer represents and agrees as follows:

1. Retailer maintains a retail store open on a regular basis to members of the public, or maintains a tennis pro shop open on a regular or seasonal basis to members of the public and/or members of an affiliated club, in each case for the transaction of retail business in tennis equipment over the counter.

2. Retailer has qualified personnel available to advise customers as to the concept underlying the Prince "full-size" racquet, including the special advantages of its unique construction, and as to the proper selection of racquets, grip size, strings and string tension. Retailer also has facilities or arrangements available for the stringing of racquets and may maintain a supply of demonstration racquets for use by customers.

3. Any Prince Precision Graphite or J/R Pro racquets sold by Prince to Retailer will be resold only over the counter to retail customers who have physically come to the retail store or pro shop.

4. Retailer, prior to any such resale, will, through qualified personnel, offer such customer the opportunity to feel the heft of a Prince racquet, provide advice in person to the Prince concept, an appropriate grip size, string and string tension and make such retail customer aware of the availability, if applicable, of a demonstration Prince Precision Graphite or J/R Pro racquet for trial.

5. Retailer understands Prince believes that the good will of tennis players towards Prince can depend in part upon their understanding of the concept behind the "full-size" Prince racquet, their purchase of a racquet as best suited to their game as will result from the personal advice of qualified personnel and trial, including the feel of the heft and light weight of the Prince racquet, before purchase.

6. Retailer also understands that a friendly and personal response to any customer complaint can play an important role in maintaining good will. Retailer will therefore encourage complaining customers to bring racquets to Retailer first for possible minor service or for assistance in returning racquets to Prince for warranty handling.

7. Retailer understands that if this application is approved and Prince commences selling Prince Precision Graphite and/or Prince J/R Pro racquets to Retailer, such sales may be discontinued at any time for Retailers

failure to observe the commitments made above, failure to meet credit requirements or other business or promotional goals of Prince, or because Prince determines to discontinue business generally with Retailer.

_____

Retailer

Application Approved: _____

Sales Representative

_____

Vice President
Prince Manufacturing, Inc.

_____

Date

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 84-465-CIV-JLK

LOMBARD'S INC., etc.,

Plaintiff,

vs.

PRINCE MANUFACTURING, INC., etc.,

Defendant.

ORDER GRANTING MOTION TO DISMISS AMENDED COMPLAINT

THIS CAUSE comes before the court upon the defendant's Motion to Dismiss Amended Complaint.

In the original complaint the plaintiff alleged that the defendant Prince Manufacturing, Inc., and Prince's parent corporation, Cheesbrough-Pond's, Inc., had conspired to restrain trade in violation of the Sherman Act, 15 U.S.C. ss. 1 and 3. The proffered Amended Complaint is filed only against Prince Manufacturing, Inc., and makes no mention of the parent corporation. The Amended Complaint alleges that the sole defendant, Prince, has conspired with "Prince dealers and others at this time unknown" to fix resale prices of Prince tennis racquets and to restrain interstate trade and commerce.

In *Quality Foods v. Latin Am. Agribusiness Devel.*, 711 F.2d 989 (11th Cir. 1983), the Eleventh Circuit Court of Appeals explained the standard for pleading an antitrust claim:

> Because of the liberal pleading requirements of the Federal Rules, rarely will a motion to dismiss for failure to state a claim be granted. Indeed, such a motion should not be granted 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' . . . This is particularly true in an antitrust suit where the proof and details of the alleged conspiracy are largely in the hands of the alleged co-conspirators. . . . Hence the Supreme Court has indicated that a complaint should not be dismissed unless it is found to be 'wholly frivolous.'
>
> This is not to say that liberal pleading requirements negate the need to draft an antitrust complaint in a careful and thoughtful fashion. An antitrust complaint 'must comprehend a so-called prima facie case,' . . . and enough data must be pleaded so that each element of the alleged antitrust violation can be properly identified. . . . Conclusory allegations that defendant violated the antitrust laws and plaintiff was injured thereby will not survive a motion to dismiss if not supported by facts constituting a legitimate claim for relief. . . . However, the alleged facts need not be spelled out with exactitude, nor must recovery appear imminent.

711 F.2d at 995 (citations omitted).

In *City of Gainesville v. Florida Power & Light Co.*, 488 F.Supp. 1258 (S.D. Fla. 1980), relied upon by

the Court of Appeals in *Quality Foods*, this court found the following language failed to state a claim:

> Upon information and belief, Cities have engaged in an unlawful combination and conspiracy among themselves and with others for the purpose of causing injury to FPL's business and property. The means employed by the Cities in furtherance of this combination and conspiracy have included . . . the commencement of numerous proceedings, including this litigation, against FPL for the specific purpose, and with the specific intent, of coercing and harrassing FPL into agreeing to demands made by the Cities of FPL.

488 F.Supp. at 1266.

That language is, in fact, much closer to stating a claim than the Amended Complaint now before the court. At least in *City of Gainesville* the claim alleged that specific entities had each done some act in furtherance of a conspiracy. In the present case, all that has been alleged is that Prince has committed a unilateral act in furtherance of a conspiracy with unknown persons.

The unilateral act performed by Prince is alleged to have been motivated by dealer complaints but who made those complaints and what the content of the complaints was is not alleged. Further, as stated by the United States Supreme Court in *Monsanto Co. v. Spray-Rite Service Corp.*, 52 U.S.L.W. 4341 (20 Mar. 1984), previously cited by this plaintiff:

> [To] permit the inference of concerted action on the basis of receiving complaints alone and thus to expose the defendant to treble damage liability would both inhibit management's exercise of independent business judgment and emasculate the terms of the statute.

52 U.S.L.W. at 4344.

This court explained in its order of 3 May, 1984, that Monsanto addressed the sufficiency of the evidence and not the sufficiency of the complaint, but it is pertinent now to explain that manufacturer reaction to dealer complaints is not necessarily improper. In the present complaint, the plaintiff has only alleged that the defendant manufacturer, Prince, has reacted to dealer complaints. However, the plaintiff has not stated with whom Prince is to have conspired nor has the plaintiff alleged when the conspiratorial agreement was entered into nor the terms of that agreement. In fact, all that the plaintiff has alleged is that Prince has conspired with someone and that Prince's refusal to sell racquets to the plaintiff is in furtherance of that conspiracy. Like the allegations of the original complaint, the conclusory allegations of the Amended Complaint are not sufficient to state a claim as required by rule 8 of the Federal Rules of Civil Procedure.

For these reasons, the court does:

ORDER and ADJUDGE that the defendant Prince Manufacturing's Motion to Dismiss Amended Complaint be, and it is, GRANTED. The Amended Complaint is DISMISSED.

DONE and ORDERED in chambers at the United States Courthouse, Miami, Dade County, Florida this 18th day of July, 1984.

JAMES LAWRENCE KING
U.S. DISTRICT JUDGE

cc: Lawrence R. Metsch, Esq.
Scott D. Sheftall, Esq.